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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EDWARD L. MOORE,

Petitioner,

v.

DAVID LAVICKY,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

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* Counsel of Record

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## QUESTION PRESENTED

1. Whether a prosecutor, who fails to follow state procedure for determining the ownership of stolen property, and who, as a result, allows victims of a theft to recover their property without a court hearing, deprives the thief (also claiming ownership) of property without due process of law where the State has in place post-deprivation remedies to consider the thief's claim.*

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*Parties to the action below were David Lavicky, Plaintiff, Bob Burnett, Deputy Sheriff of Garfield County, Sam Otis, Deputy Sheriff of Alfalfa County, Delmar Coppock, Sheriff of Alfalfa County, Edward L. Moore, Assistant District Attorney, Alfalfa County, and Ray Pickle, Sheriff of Garfield County.

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IN THE
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October Term, 1985

No. _____

EDWARD L. MOORE,

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v.

DAVID LAVICKY,

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

---

The Petitioner, Edward L. Moore, former Assistant District Attorney, of Alfalfa County, Oklahoma, by and through the Attorney General of the State of Oklahoma, Michael C. Turpen, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit for which this petition is sought is reported as Lavicky v. Burnett, 758 F.2d 468 (10th Cir. 1985). This Opinion was filed on March 19, 1985. A timely petition for rehearing en banc was denied on July 26, 1985. The Court of Appeals recalled its mandate pending filing of this Petition for Writ of Certiorari. The text of the Court of Appeals' Opinion herein is attached hereto as Appendix A. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 51 O.S.Supp.1978, § 153 states in its entirety:

> Each political subdivision of this state shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment or duties subject to the limitations specified in this act. A political subdivision shall not be liable under the provisions of this act for any act or omission of an employee because of corruption or fraud of the employee.

Title 51 O.S.Supp.1978, § 162 states in pertinent part:

> **§162. Constitutional or statutory rights, privileges or immunities-Violation by employee-Defending-Indemnification-Right of recovery-Punitive or exemploary damages**
>
> A. A political subdivision, subject to procedure requirements imposed by statute, ordinance, resolution or written policy, shall:
>
> . . .
>
> 2. Pay or cause to be paid any judgment entered against any employee and/or political subdivision or settlement agreed to by the political subdivision entered against any employee; and any costs or fees, for a violation of property

> rights or any rights, privileges or immunities secured by the Constitution or laws of the United States which occurred while the employee was acting within the scope of employment.

Title 74 O.S.Supp.1976, § 20f states in pertinent part:

> F. Any officer or employee who acts outside of the scope of his official authority shall be liable in damages in the same manner as any private citizen.

## STATEMENT OF THE CASE

### PROCEDURAL HISTORY

This case was originally a civil rights action filed pursuant to 42 U.S.C. § 1983 in which the Plaintiff asserted federal jurisdiction under the provisions of 28 U.S.C. §§ 1331 and 1343(3). The issues asserted herein were first raised by the Defendants below in a Motion for Summary Judgment filed in the United States District Court for the Western District of Oklahoma on August 31, 1981. These issues were renewed at trial and a Motion for Directed Verdict. The federal

question presented to this Court was considered and decided by the Court of Appeals below.

## STATEMENT OF THE FACTS

Your Petitioner, Edward L. Moore, was an Assistant District Attorney in Alfalfa County, Oklahoma, who prosecuted the Respondent herein for larceny of a motor vehicle. As will be shown below, the evidence at the criminal trial indicated that the Respondent stole a certain pick-up truck and incorporated parts from that truck, including the engine and transmission, in his own truck. At the conclusion of the criminal trial, your Petitioner, Ed Moore, allowed the victims of the larceny to recover their stolen property by self-help. Neither Ed Moore nor any of the other Defendants below used the applicable state procedure for determining the ownership of stolen property. The Respondent did not use any of the available state remedies to either

secure property he claimed was his or to recover damages for its return to the rightful owners. In the recitation of the facts which follow the parties will be referred to by their federal trial court designations. Transcript references are to the transcript of the federal trial.

On January 19, 1979, the Plaintiff herein, David Lavicky, stole from Bruce and Ronnie Eckhardt of Cherokee, Alfalfa County, Oklahoma, a pickup truck which was parked in the front yard of the Eckhardt residence (TR. 363-64). At the time of the theft, the Plaintiff was accompanied by two other young men, Tony Joslin and Gerald Coleman. The three men had been to a nightclub in a nearby town when the Plaintiff separated from Joslin and Coleman in order to steal the Eckhardt truck (Tr. 363-64). Later, the Plaintiff told Coleman that he was taking the stolen truck to Mootz Garage where he

was going to "strip it out" (Tr. 364-65). By "strip it out," Coleman understood the Plaintiff to mean that he was going to take the engine, the transmission, the wheels, and the seats from the Eckhardt truck and use them in his own pickup (Tr. 365). At a later time, Coleman saw the stolen engine and transmission in the Plaintiff's pickup truck (Tr. 372). He saw the engine on the back of the Plaintiff's truck and later afterwards when it had been installed in the truck itself. He also saw the stolen transmission in the Plaintiff's truck (Tr. 374-76). Then, on or about March 8, 1979, Gerald Coleman, along with his father, went to a Deputy Sheriff of Garfield County, Oklahoma, Bob Burnett, and admitted to Deputy Burnett that Gerald Coleman had been involved in the theft of the truck from Cherokee, Oklahoma (Tr. 370-71).

Another young man, Gary Wayne Mootz, in late January, 1979, helped the Plain-

tiff "strip out" the stolen Eckhardt 1959 Chevrolet pickup in Mootz' father's garage in Enid, Oklahoma (Tr. 383-84). The two young men pulled out the motor and transmission and the wheels and seat and took all of the parts off the stolen Eckhardt pickup which were still any good (Tr. 384). Before stripping the Eckhardt pickup, Mootz went with the Plaintiff to pick up the stolen truck at the Plaintiff's trailer house in Enid, Oklahoma (Tr. 384). At the time the truck was stripped, the Plaintiff told Gary Mootz that he was stripping it in order to take the motor, transmission and wheels to put on the Plaintiff's own 1964 black Chevrolet pickup truck (Tr. 385). After stripping the stolen Eckhardt pickup truck, Mootz and the Plaintiff towed the stolen truck outside of Enid, Oklahoma, and pushed it into a dry river bed. There the Plaintiff set the stolen truck on fire (Tr. 385-86). Later, on or about

March 8 or 9, 1979, Gary Mootz went to the Sheriff's Office of Garfield County, Oklahoma, where he explained his involvement with the stolen truck to authorities (Tr. 386).

Garfield County Deputy Sheriff Bob Burnett received the reports of Gerald Coleman and Gary Mootz regarding their involvement with the stolen Eckhrdt truck (Tr. 242-45). Thereafter, Burnett arrested the Plaintiff pursuant to arrest warrant on March 15, 1979 (Tr. 247-48). At the time of the arrest, Burnett saw under the raised hood of the Plaintiff's pickup a small block Chevrolet engine and Holly carburetor matching the description of parts stolen from the Eckhardt truck (Tr. 249). By the time the Plaintiff was booked into the Garfield County Jail, it was approximately 8:00 p.m. on the evening of March 15, 1979 (Tr. 251). Deputy Burnett returned to the Plaintiff's home and arranged to tow the Plaintiff's truck

to a safe location on the following day, March 16, 1979 (Tr. 252). Later that day, Undersheriff Sam Otis from adjoining Alfalfa County, Oklahoma, came to Enid, in Garfield County, Oklahoma, and brought the actual arrest warrant for the Plaintiff, which had been secured the previous day, and inspected the Plaintiff's truck along with Bruce Eckhardt, the owner of the stolen parts which had been incorporated into the Plaintiff's truck (Tr. 252-53). The Plaintiff was transported to the Alfalfa County Jail on March 16, 1979, in order to answer to the charge of Larceny of an Automobile based upon the theft of the Eckhardt truck (Tr. 18).

The Defendant Ed Moore was not present at the seizure of the Plaintiff's truck (Tr. 328). After the Plaintiff was taken to Alfalfa County for prosecution, the Sheriff of Alfalfa County had custody of the Plaintiff's pickup truck (Tr. 350). Ed Moore, as Assistant District

Attorney, successfully prosecuted the Plaintiff for Larceny of a Motor Vehicle at trial, which began on November 9, 1979. Ed Moore was also the Assistant District Attorney who handled the Plaintiff's sentencing on December 18, 1979.

After the Plaintiff's sentencing on December 18, 1979, his attorney asked Ed Moore for the return of the Plaintiff's pickup truck, which contained the stolen Eckhardt engine and transmission (Tr. 131-32). This conversation took place near the Court Clerk's office in the Alfalfa County Courthouse (Tr. 132). Ed Moore declined to return the pickup until the complaining witnesses, the Eckhardts, had an opportunity to retrieve the parts from it which had been stolen from them (Tr. 133). At that time, Ed Moore suggested that the Plaintiff file a replevin action to recover his pickup (Tr. 308). The Plaintiff's criminal trial counsel never suggested to Ed Moore that the

stolen Eckhardt parts actually belonged to the Plaintiff (Tr. 149). Nor did the Plaintiff's counsel renew his earlier motion for return of the pickup after trial. (307). No replevin action was filed, nor was any action filed against any of the Defendants below under the Oklahoma Political Subdivision Tort Claims Act (Tr. 147-48).

The Plaintiff's truck, containing the stolen Eckhardt parts, was taken to the courthouse to be used as a possible exhibit during the trial (Tr. 84). Prosecutor Moore decided against using the truck as an exhibit, however, because of the difficulty of getting the truck up the three flights of stairs to the courtroom and marking and admitting it as an exhibit at trial. (Tr. 311-13).

After trial, Ed Moore informed the Sheriff, who had custody of the Plaintiff's truck containing the stolen Eckhardt parts, that he did not see anything

wrong with letting the Eckhardts remove their stolen property as long as some precaution was taken that they took only their property or at least had an opportunity to further make sure that the engine was in fact theirs (Tr. 314). The stolen Eckhardt engine had been rebuilt and customized by Ronnie Eckhardt to contain a Coors beer can shim in part of the engine (Tr. 314). Therefore, Ed Moore arranged with the Plaintiff's brother, Lewis Lavicky, who owned a garage to permit the Eckhardts to remove their property from the Plaintiff's truck (Tr. 315-16). Ed Moore informed Plaintiff's counsel of this arrangement which had been made with the Plaintiff's brother (Tr. 316). Neither prosecutor Moore nor the Sheriff applied to the magistrate to determine the ownership of the property pursuant to 22 O.S. § 1322.

The Eckhardts removed the engine, transmission and rear wheels which had

originally belonged to them from the Plaintiff's truck (Tr. 213). Upon inspection, the Eckhardts discovered the distinctive Coors beer can shim which Ronnie Eckhardt had incorporated into the stolen engine (Tr. 214). Earlier, in March of 1979, the Eckhardts had inspected the Plaintiff's truck after it had been impounded in Enid, Oklahoma, in the presence of Deputy Bob Burnett and had found their stolen carburetor, valve covers, transmission, rear wheels and 1963 Chevrolet Impala short block engine which had been incorporated in the Plaintiff's truck (Tr. 209-11). On January 22, 1980, Alfalfa County Undersheriff Sam Otis called Plaintiff's criminal defense lawyer to say that the Plaintiff could pick up his truck, minus the recovered Eckhardt parts, at the Alfalfa County barn (Tr. 134).

## REASONS FOR GRANTING PETITION

### PROPOSITION I

**THE COURT BELOW DECIDED THIS CASE ON A THEORY SPECIFICALLY REJECTED BY THIS COURT IN HUDSON V. PALMER**

Last year this Court held that an unauthorized, intentional deprivation of property by a state employee does not constitute a violation of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivational remedy for the loss is available. Hudson v. Palmer, 468 U.S. ___, 104 S. Ct. 3194, 3204 (1984). This reasoning followed the Court's earlier decision under Parratt v. Taylor, 451 U.S. 527, 541 (1981), where the Court held that a negligent property loss occasioned by a random, unauthorized act, rather than by an established state procedure, was not a deprivation "without due process of law" where the State provided an adequate post-deprivation remedy.

In Hudson the Court noted that for intentional as well as for negligent deprivations of property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy. Id., 468 U.S. at ___, 104 S.Ct. at 3204, n. 14. In this regard, this Court went on to reject the very theory upon which the Court below decided the present case. In doing so, this Court used the following language:

> Respondent presses two arguments that require at least brief comment. First, he contends that, because an agent of the state who intends to deprive a person of his property "**can** provide predeprivation process, then as a matter of due process he must do so." Brief for Respondent 8 (emphasis in original). This argument reflects a fundamental misunderstanding of Parratt. There we held that post-deprivation procedures satisfy due process because the **State** cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the State is in a position

to provide for predeprivation process.

Id., 468 U.S. at ___, 104 S.Ct. at 3204 (bold emphasis original; other emphasis added). Therefore, the emphasis clearly is upon the practicability of a pre-deprivation hearing by the State, and not at all the practicability of pre-deprivation process from its employees who are defendants in a lawsuit.

The Court below cited the foregoing language. Lavicky v. Burnett, 758 F.2d at 473. After acknowledging that the controlling inquiry is solely whether the State is in a position to provide predeprivation process, the Court below immediately turned its attention from the State to the conduct of the individual Defendants. The Court below then concluded that the actions of the individual Defendants could not be characterized as random or unauthorized because the Defen-

dants could have given Plaintiff a hearing but did not. Id., 758 F.2d at 473.

However, their conduct was "random and unauthorized" from the point of view of the State of Oklahoma which had established a statutory procedure for determining ownership of stolen property. 22 O.S.1981, §§ 1321 -1322. Indeed, there is no conceivable way the State of Oklahoma could anticipate or forestall the failure of state actors to follow the statutory procedure, whether that failure is negligent or intentional. The State is simply not in a position to provide for pre-deprivation process before its employees disposed of the truck without following the proper statutory procedure. Parratt and Hudson were intended for just such circumstances as this.

The Court below found that the action of the Defendants, planned and authorized, is not the sort of action for which post-deprivation process will suf-

fice, citing Logan v. Zimmerman Brush Company, 455 U.S. 422, 436-37 (1982), and Augustine v. Doe, 740 F.2d 322, 327-29 (5th Cir. 1984). Lavicky, 758 F.2d at 473. This Court distinguished the facts in the Logan case from the Parratt case by noting that Parratt dealt with the tortious loss of property as a result of a random and unauthorized act by a state employee, and not as a result of an established state procedure; whereas, in Logan, the state system itself destroyed a complainant's property interest by operation of law when a state agency failed to convene a timely conference. Logan, supra, 455 U.S. at 435-36. In the present case, it cannot fairly be said that Ed Moore's actions, whether negligent or intentional, deprived the Plaintiff of his truck by operation of law. Quite the contrary, Oklahoma law provided for a hearing before determining ownership of stolen property. Instead,

Ed Moore's activities clearly fall within the scope of Parratt and Hudson in that his actions were the unauthorized failure of state employee to follow the proper procedures.

There is no principled distinction between the destruction of the Plaintiff's property in Hudson and the return of the stolen property to its rightful owners by Ed Moore. In each case, a state employee acted in a way unauthorized by state law. In each case, a state employee acted in a way which the state governments could not anticipate or forestall. Therefore, the Court of Appeals' reliance upon the Logan case is misplaced. Remembering that the Fourteenth Amendment protects against deprivations of property by the State without due process of law, the focus must necessarily be upon process afforded by the State, rather than the employee. This is the teaching of Parratt and Hudson, which

the Court below ignored while citing this Court's very language on the question.

The court below has already relied upon Lavicky to find a constitutional violation in a second case in which an Oklahoma Prosecutor returned stolen property to its rightful owner without a formal hearing. Wolfenbarger, d/b/a Shady Sam's Pawn Shop v. Williams, et al., No. 83-2331, slip op. at 15-17 (10th Cir. Sept. 26, 1985) (claim of pawnbroker to whom stolen property had been pledged). However, Judge Seth dissented on substantially the same theory asserted herein saying:

> I also no longer agree with the majority opinion in Lavicky v. Burnett, 758 F.2d 468 (10th Cir.), relied on by the majority opinion herein, although I was on the panel in that case, since I now see the error of my ways.

Wolfenbarger, supra. dissent slip op. at 1. Thus, at least one judge deciding the opinion below has unambiguously abandoned it.

The adoption of the wrong theory by the Court of Appeals leaves public officials throughout the Tenth Circuit at jeopardy from unnecessary federal litigation where the states of that circuit provide constitutionally adequate post-deprivation remedies. It literally results in making federal cases of simple matters which, as here, deal only with the ownership and disposition of property. State courts and administrative procedures have ample experience in deciding such questions. The Court below implicitly found the Oklahoma Political Subdivision Tort Claims Act, 51 O.S. 1981, § 151 et seq. to be a satisfactory post-deprivation remedy. Lavicky v. Burnett, 758 F.2d at 472. The statute in effect at the time of the event herein, 51 O.S. Supp. 1978, § 153, made each political subdivision liable for the torts of its employees acting within the scope of their employment. Further, 51 O.S.

Supp. 1978, § 162(a)(2) required political subdivisions to pay any judgments entered against an employee along with costs or fees for the violation of the property rights or any rights, privileges or immunities secured by the Constitution. Further, 74 O.S. Supp. 1976, § 20f(F) provides that any state officer or employee who acts outside the scope of his official authority is liable in damages in the same manner as any private citizen. In addition, albeit after the event in question, the Oklahoma Supreme Court has created a common law right of action for Constitutional violations in Oklahoma courts. Prock v. District Court of Pittsburg County, 630 P.2d 772, 779 (Okl. 1981). Finally, normal remedies such as writs of replevin or tort suits for conversion would be applicable in cases such as the one at hand. Clearly, the State of Oklahoma has provided a pan-

oply of post-deprivation remedies for such cases. As a final aside, the court below rejected, or overlooked, the substantive property law of Oklahoma which states that in cases in which one willfully uses the materials of another without consent (as here), the product belongs to the owner of the material, if its identity can be traced (as here). See 60 O.S. 1981 § 347. Thus, when David Lavicky blended the stolen Eckhardt parts with his own truck chassis he lost ownership of the whole and had no property interest to protect.

In light of these remedies, the Court below seriously erred in finding a Fourteenth Amendment violation. The effect of this error is virtually to write Hudson out of existence in the Tenth Circuit. Governmental officials, already besieged by civil rights litigation, have a right to rely upon this Courts' interpretation of the Fourteenth Amendment and

have claims heard, where appropriate, in state courts. Such reliance on adequate post-deprivation remedies in state courts would have the additional benefit of reducing overcrowded federal dockets and making state courts more aware of federal constitutional questions.

Lest the Court think the present case is an isolated phenomenon, Ed Moore would invite the Courts' attention to cases from the Tenth Circuit which have apparently also written this Courts' opinion in Ingraham v. Wright, 430 U.S. 651 (1977) off the books. That case held, on facts there present, that where the state had preserved what had always been the law of the land regarding post-deprivation remedies, some deprivation of liberty required no predeprivation process. Id., 430 U.S. at 679 n. 47. However, in Lusby v. T.G.& Y. Stores, 749 F.2d 1423, 1434 (10th Cir. 1984), a case involving the deprivation of liberty, the Tenth

Circuit stated that no post-deprivation remedy in the form of damages can ever fully compensate for time wrongfully spent in custody. The Tenth Circuit used even stronger language in Hewitt v. City of Truth or Consequences, 758 F.2d 1375, 1379 n. 4 (10th Cir. 1985), when it stated that where a deprivation of life or liberty is involved, no post-deprivation state remedy in the form of damages can ever provide a meaningful hearing to the victims so as to satisfy procedural due process. While reasonable people might disagree on whether Ingraham should be extended beyond the facts there present, the categorical language found in Hewitt and Lusby effectively overrule this Courts' opinion for the states of the Tenth Circuit.

Further, while the court below relied on the fact the Defendants did not follow state policy in disposing of property, this Court in Ingraham held post depriva-

tion remedies adequate even where there was evidence of violation of state policy favoring consultation with the principal before paddling school children. Compare Ingraham v. Wright, 430 U.S. at 657 and 682, with Lavicky v. Burnett, 758 F.2d at 473. The court below also ignored this Court's actions in Lehman v. Weis, 454 U.S. 807 (1981), remanding a case in which a Forest Service employee failed to follow proper procedures in disposing of apparently abandoned property to the Court of Appeals in light of Parratt. On remand the Ninth Circuit directed the trial court to consider facts to determine the applicability of Parratt, which had not yet been extended by Hudson. Weiss v. Lehman, 676 F.2d 1320, 1323 (9th Cir. 1982). As we suggest again, the crucial inquiry is not whether a procedure is followed, but whether the State itself could anticipate the official's failure to follow it.

Clearly, the Tenth Circuit is out of step with this Courts' pronouncements in Ingraham, Parratt and Hudson. Ed Moore respectfully requests this Court to grant the Writ of Certiorari, review the Courts' actions below and reverse them.

## PROPOSITION II

### THE OPINION BELOW IS IN CONFLICT WITH SIMILAR AUTHORITY FROM THE SIXTH CIRCUIT.

In Wagner v. Higgins, 754 F.2d 186 (6th Cir. 1985), the Court of Appeals dealt with an allegation by a convicted criminal defendant (as here) that his automobile, seized by police officers, had been stripped. Id., 754 F.2d at 191. Therein the Court noted that remedies at state law including conversion and an application to the state criminal trial judge for return of property were available. In light of these remedies, the Sixth Circuit applied Parratt and Hudson to hold there was no deprivation of pro-

perty without due process of law. Wagner v. Higgins, 754 F.2d at 192.

The similarity of fact circumstances is clear. In both cases cars were seized in connection with criminal proceedings. In both cases it was alleged that the vehicles were stripped or property taken from them. In both cases the Defendants argued that state post-deprivation remedies were adequate. However, the Sixth Circuit in Wagner followed this Courts' precedent in Parratt and Hudson whereas the Tenth Circuit below chose to adopt a theory this Court specifically rejected. Public servants in both circuits deserve a clear pronouncement by this Court regarding which theory of due process is to be the law of the land. Finally, Ed Moore could cite to the Court numerous cases from other circuits in which this Courts' teachings from Parratt and Hudson have been applied to conduct which could be considered "planned and authorized."

The fact that the Tenth Circuit has chosen in this case to avoid applying the teachings of Parratt and Hudson to these facts indicates that the Tenth Circuit is not only out of step with this Court but with the overwhelming weight of authority from the other Courts of Appeals.

## CONCLUSION

For the reasons stated, Ed L. Moore respectfully asks this Court to grant the Petition for Writ of Certiorari and review, and reverse, the opinion of the Court below.

Respectfully submitted,

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**APPENDIX A**

**IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

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**Nos. 82-1969, 82-1998 and 82-1999**

DAVID LAVICKY,

Plaintiff-Appellee and Cross-Appellant,

v.

BOB BURNETT, Deputy Sheriff of Garfield County, et al.,

Defendants-Appellants and Cross-Appellees.

March 19, 1985

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**OPINION**

LOGAN, Circuit Judge:

These appeals arise from a jury verdict granting plaintiff David Lavicky damages for violations of his Fourth and Fourteenth Amendment right to be free from warrantless searches and seizures and for violations of his Fifth and Four-

teenth Amendment right not to be deprived of property without due process of law. The jury awarded plaintiff compensatory damages of $300 and punitive damages of $250 against each defendant. The trial court, however, granted defendants' motion for judgment n.o.v. on the issue of punitive damages. Plaintiff alleged violations of 42 U.S.C. §§ 1983, 1985(3), and 1986. On appeal we analyze the case only under 42 U.S.C. § 1983, because there are insufficient allegations of a racial or other class-based conspiracy to support the 42 U.S.C. §§ 1985(3) and 1986 claims. See Santistevan v. Loveridge, 732 F.2d 116, 117-18 (10th Cir. 1984).

All defendants claim on appeal that: (1) plaintiff was not deprived of due process; (2) plaintiff is collaterally estopped from asserting a Fourth Amendment violation because the state

court declined to suppress the seized evidence at his criminal trial; and (3) defendants did not violate plaintiff's Fourth Amendment rights. In addition, defendant Deputy Sheriff Bob Burnett claims he should not have been found liable because of his qualified immunity as a deputy sheriff. Defendant Undersheriff Sam Otis claims that the trial court erred by not granting his motions for directed verdict and judgment n.o.v. based on his tenuous involvement in the vehicle search and seizure. Defendant Sheriff Delmar Coppock claims that the trial court erred by not granting his motion for judgment n.o.v. for the same reason. Finally, defendant prosecutor Ed L. Moore claims he should be absolutely immune from suit as a prosecutor. Plaintiff cross-appeals, claiming that the trial court erred in

granting the judgment n.o.v. denying his punitive damage award.

On March 15, 1979, Deputy Sheriff Burnett arrested plaintiff while plaintiff was working on his pickup truck at his home in Enid, Oklahoma, in Garfield County. Burnett had an arrest warrant which had been issued in Alfalfa County in connection with the larceny of an automobile owned by Bruce and Ronnie Eckhardt of Alfalfa County. Burnett testified that while making the arrest he observed parts from the stolen Eckhardt truck, particularly the carburetor and valve covers, on plaintiff's pickup. At the time of the arrest Burnett neither seized nor searched the pickup. Instead, the next morning, without obtaining a warrant, Burnett arranged to have plaintiff's pickup towed to Franklin Motors in Garfield County. Burnett testified that Undersheriff Otis assisted

him in towing the pickup. Later in the day Burnett, Otis and Ronnie and Bruce Eckhardt conducted a warrantless search of plaintiff's pickup at Franklin Motors.

On approximately March 21, 1979, Tom Kent, a tow-truck operator, met with Otis, and Kent then towed plaintiff's vehicle from the Franklin Motors Garage to Kent's garage in Helena, Alfalfa County, where he stored it. The pickup was brought to the Alfalfa County courthouse for plaintiff's larceny trial and was returned to Kent's garage after one day at the courthouse. Neither the pickup, nor any parts of the truck, were introduced into evidence during the criminal trial. During the trial the prosecution did attempt to enter into evidence a screwdriver set found in the pickup, but the court ruled it inadmissible.

A state court jury convicted plaintiff of larceny of an automobile. On the day the court sentenced plaintiff for automobile larceny his attorney asked prosecutor Moore if plaintiff could obtain his pickup truck from the county. Moore told plaintiff's attorney that his truck could be returned as soon as the Eckhardts claimed their parts from it. In order to allow the Eckhardts to claim their parts, defendants Moore, Coppock and Otis arranged to have the pickup towed to a garage in Cherokee, Oklahoma. The Eckhardts removed the parts that they believed were theirs and then the owner of the Cherokee garage called Sheriff Coppock to have the pickup returned to Kent's garage. Otis then informed plaintiff's attorney that plaintiff could claim his truck. After plaintiff observed that the tires and wheels had been taken the engine, transmission, and

stereo were gone, the seats and carpets were torn and the entire truck was essentially stripped, he filed this civil rights action against defendants for the alleged constitutional violations arising out of these events.

I

**DUE PROCESS CLAIM**

Defendants argue that Plaintiff may not bring a § 1983 claim for deprivation of property without due process because plaintiff had a postdeprivation remedy under the Oklahoma Political Subdivision Tort Claims Act, Okla.Stat.Ann. tit. 51, §§ 151-170, which would provide constitutionally adequate procedural due process. Although we agree that postdeprivation state remedies can provide adequate process for some intentional deprivations, we do not agree that plaintiff in this case should be restricted to his postdeprivation remedy.

In Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2nd 420 (1981), the Supreme Court held that the Due Process Clause is not violated when a state employee, by a random and unauthorized act, negligently deprives an individual of property, if the state makes available meaningful postdeprivation remedy. Hudson v. Palmer, __ U.S. ___, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), extended that rule to random and unauthorized intentional conduct of state employees.[1]

In Coleman v. Turpen, 697 F.2d 1341 (10th Cir. 1982),this court, interpreting

[1]If Parratt and Hudson are applicable to the instant case they apply only to the procedural due process claims under the Fifth and Fourteenth Amendments. They do not apply to violations of substantive constitutional proscriptions under the Fourth Amendment. See Parratt, 451 U.S. at 536, 101 S.Ct. at 1913; Hudson, ___ U.S. at ___ n. 4, 104 S.Ct. at 3208 n. 4 (Stevens, J., concurring and dissenting); Augustine v. Doe, 740 F.2d 322, 325-27 (5th Cir. 1984).

Parratt, held that a prisoner may assert a § 1983 cause of action for deprivation of property without due process when the state retained money, not used as evidence, that it had seized from the prisoner. We said:

> It might have been impractical for the State to give Mr. Coleman a hearing before it seized the money during his arrest. However, the deprivation Mr. Coleman challenges is not the seizure of the money, but its retention by the State until his execution. A hearing to determine the propriety of this retention is not impractical.

Id. at 1344.

The Supreme Court's ruling in Hudson does not overrule our Coleman decision. The Court in Hudson, applying the rationale of Parratt to intentional torts, reasoned that a state could not anticipate its employees' "random and unauthorized" intentional conduct any more than it could anticipate similar negligent conduct. ___ U.S. at ___, 104 S.Ct. at 3203. Consequently, it was similarly

impractical for a state to be required to hold predeprivation hearings for "random and unauthorized" intentional conduct. Id. Furthermore, the Court rejected prisoner Palmer's argument that postdeprivation hearings do not provide a meaningful remedy when an agent of a state could have held a predeprivation hearing. The Supreme Court concluded: "Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the State is in a position to provide for predeprivation process." Id.

In the instant case, the defendants' conduct in disposing of the pickup could not be characterized as the sort of random or unauthorized action that may be remedied by postdeprivation hearings. The record reveals that plaintiff's attorney approached prosecutor Moore requesting

return of the vehicle after the larceny trial. Moore responded that the plaintiff's truck would be returned after the Eckhardts received their stolen parts. Coppock and Otis coordinated the dealing with the Eckhardts and arranged the recovery of the parts the Eckhardts claimed to be theirs. These actions constitute an intentional deprivation that may not be characterized as random. Moreover, Moore indicatd that he believed, as a policy matter, that he had the duty to turn over the allegedly stolen parts to the Eckhardts without a hearing. This action, planned and authorized, is not the sort of action for which postdeprivation process will suffice. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 436-37, 102 S.Ct. 1148,1158-59, 71 L.Ed.2d 265 (1982); Augustine v. Doe, 740 F.2d at [illegible]-29.

In this case, as in Coleman, it was not impractical for the state officials to hold a hearing to determine the ownership of the truck and its parts before its disposition, indeed Oklahoma law already has a framework, which the officials have ignored, for determining ownership of allegedly stolen property prior to its disposition. An Oklahoma statute on seized stolen property provides that "[w]hen property alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it subject to the order of the magistrate authorized by the next section to direct the disposal thereof." Okla.Stat.Ann. tit. 22, § 1321 (footnote omitted). The following section provides:

> On satisfactory proof of the title of the owner of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or

> embezzling the property, may order it to be delivered to the owner....

Okla.Stat.Ann. tit. 22, § 1322. Given the existence of this statutory framework and the planned nature of defendants' actions, we conclude that plaintiff's procedural due proces rights in the disposition of his pick-up and its parts were violated.

II

**COLLATERAL ESTOPPEL**

Defendants correctly assert that the doctrine of collateral estoppel may preclude plaintiff from litigating a Fourth Amendment issue in a § 1983 action if a state court has decided that same issue in previous litigation. See Allen V. McCurry, 449 U.S. 90, 105, 101 S.Ct. 411, 420, 66 L.Ed.2d 308 (1980); Searing v. Hayes, 684 F.2d 694, 697 (10th Cir. 1982) (per curiam). Defendants specifically argue that because the state trial court

refused to suppress the evidence gathered in the search of plaintiff's pickup, plaintiff is collaterally estopped from relitigating the Fourth Amendment illegal search and seizure issue in this § 1983 action. Although we recognize that the state trial court did deny plaintiff's pretrial suppression motion, in light of the court's later decision to exclude the only evidence offered at trial from that search, that pretrial order does not preclude plaintiff's Fourth Amendment claim here.

The state trial judge expressed doubt during the trial regarding the validity of his earlier ruling refusing to suppress the items seized by police. Plaintiff's attorney at the larceny trial objected when the prosecutor attempted to introduce a screwdriver set taken from the pickup after its seizure. The court suppressed the proffered evidence,

despite its earlier decision. Pl.Ex. 13. Although the court's basis for suppressing this evidence is unclear, it appears that the court was not convinced that defendants had adhered to Fourth Amendment search and seizure standards.[2]

[2]The court said:

> I don't think this is admissible, the search instance, the arrest he was taken with him that evening. At the time I heard this Motion before it was my understanding that virtually everything on his car was off this stolen car but now it eviedently [sic] it wasn't. I am going to suspress [sic] that, the screw drive [sic] set, would you pick it up and put it back over there.

Thus, we cannot say as a matter of law that the illegality of defendants' search and seizure activities was "distinctly put in issue and directly determined" by the Oklahoma state trial court in its suppression decisions. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569, 71 S.Ct. 408, 414, 95 L.Ed. 534

(1951). Without that court's definite determination that evidence need not be suppressed despite allegations of a Fourth Amendment violation, defendants may not use collateral estoppel to preclude plaintiff's litigation of the Fourth Amendment claims in this § 1983 action.

III

**FOURTH AMENDMENT EXCEPTIONS TO THE WARANT REQUIREMENT**

Plaintiff's recovery upon his Fourth Amendment claim depends upon whether defendants acted unlawfully when they towed, impounded, and searched his vehicle without a warrant the day after his arrest for automobile larceny. The underlying premise of the Fourth Amendment is that warrantless searches and seizures are per se unreasonable for a few narrowly defined exceptions. Arkansas v. Sanders, 442 U.S. 753, 758-

59, 99 S.Ct. 2586,2589-91, 61 L.Ed.2d 235 (1979); Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2031-32, 29 L.Ed.2d 564 (1971) (plurality opinion). Plaintiff has a cognizable constitutional claim for defendants' actions if those actions do not fall within one of the warrant requirement exceptions.

Defendants argue that the warrantless seizure of plaintiff's truck the day after his arrest was proper under the search incident to arrest exception, United States v. Edwards, 415 U.S. 800, 802, 94 S.Ct. 1234, 1236, 39 L.Ed.2d 771 (1974); Chimel v. California, 395 U.S. 752, 755-65, 89 S.Ct. 2034, 2035-41, 23 L.Ed.2d 685 (1969), and under the plain view doctrine, Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968) (per curiam). We discuss each exception separately.

Under the search incident to arrest exception, a police officer, incident to an arrest, may search a person "and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. Chimel, 395 U.S. at 768, 89 S.Ct. at 2043. Because Burnett arrested plaintiff while he was working on his pickup, Burnett could have seized any evidence of stolen parts that were within the immediate area at the time of arrest. Burnett, however, did not seize the vehicle at the time of arrest; instead, he waited overnight before acting.

The search incident to arrest exception i. not applicable to this case. The exception protects the arresting officer and prevents the concealment or destruction of evidence within the arrested person's immediate control at the time of arrest. Chimel, 395 U.S. at

762-63, 89 S.Ct. at 2039-40. A necessary corollary of this rationale is that a valid search incident to arrest requires the search and arrest to be substantially contemporaneous. United States v. Davis, 423 F.2d 974, 979 (5th Cir.), cert. den., 400 U.S. 836, 91 S.Ct. 74, 27 L.Ed.2d 69 (1970). In this case the search was not substantially contemporaneous and therefore may not be validated under that exception.

We recognize that the Supreme Court has allowed delayed warrantless searches of automobiles taken into custody at the time of arrest and of packages taken from automobiles at the time of arrest. See United States v. Johns, ___ U.S. ___, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985). Nevertheless, the automobile exception does not apply. The pickup was partially dismantled, and it was on private property, not on a public way.

Furthermore, it was not taken into custody at the time of the arrest. This fact distinguishes United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), relied upon by defendants. In Edwards the Court upheld a warrantless search and seizure of defendant's clothing the morning after his custodial arrest. Id. at 803-04, 808, 94 S.Ct. at 1237-38, 1239. But the officers had custody of defendant, as well as defendant's clothing, from the time of arrest until the time of seizure. The defendants in the instant case did not take the truck into custody at the time of Plaintiff's arrest and thus cannot argue that their actions were merely a matter of search evidence of which they had custody.

Defendants also argue the subsequent seizure of the pickup was justified because at the time of arrest the stolen

parts were within Burnett's plain view. By waiting until the next day to seize the pickup, however, defendants fail to satisfy the inadvertence requirement of the plain view doctrine. See United States v. Tolerton, 669 F.2d 652, 654 (10th Cir.), cert. denied, 456 U.S. 949, 102 S.Ct. 2020, 72 L.Ed.2d 473 (1982). Burnett knew the exact location of plaintiff's truck the day after plaintiff's arrest and thus cannot argue that the seizure was inadvertent. As the Supreme Court noted in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), when the police know in advance the location of evidence that they intend to seize, "The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se

unreasonable' in the absence of 'exigent circumstances.'" Id. at 470-71, 91 S.Ct. at 2040 (emphasis in original).

IV

**Qualified Immunity**

Defendant Deputy Sheriff Burnett argues that even if his actions in seizing the truck violate the Fourth Amendment, he cannot be held liable if those actions were taken in good faith. Burnett possesses qualified immunity from liability under § 1983 if he proves that he did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). We have recently approved a jury instruction similar to the one used by the trial court in the instant case. Varela v. Jones, 746 F.2d 1413 (10th Cir. 1984). We believe that the evidence

presented could support a jury finding that a reasonable police officer would have known that he was violating the plaintiff's Fourth Amendment rights by seizing the truck without a warrant under the circumstances involved in this case. Therefore, we reject defendant Burnett's argument of qualified immunity.

V

**Sufficiency of the Evidence**

Defendant Burnett argues that he is not liable to plaintiff because there is no evidence that his actions caused any damage to plaintiff's truck. We reject this argument. Plaintiff is not merely suing for the actual damage to his pickup; he is suing for the violation of his constitutional rights. The purpose of § 1983 is to compensate persons for injuries caused by deprivations of their constitutional rights. Here there was a violation of plaintiff's right to be free

from unreasonable searches and seizures, and, as a result, he may recover damages for that violation. See Corriz v. Naranjo, 667 F.2d 892, 897 (10th Cir. 1981), cert. dismissed, 458 U.S. 1123, 103 S.Ct. 5, 73 L.Ed.2d 1394 (1982); Smith v. Heath, 691 F.2d 220, 226 (6th Cir. 1982); cf. Hostrop v. Board of Junior College, District No. 515, 523 F.2d 569, 579 (7th Cir. 1975) (citing cases awarding damages in civil rights cases where no pecuniary loss shown), cert. denied, 425 U.S. 963, 93 S.Ct. 1748, 48 L.Ed.2d 208 (1976).

Defendants Otis and Coppock claim that the trial court erred in not granting their motions for a directed verdict or for judgment n.o.v. A court determining whether to grant such motions must determine whether there is evidence upon which the jury properly could find for the non-moving party. Brown v.

McGraw-Edison Co., 736 F.2d 609, 612-13 (10th Cir. 1984). The appellate court applies the same standard in reviewing a motion for a judgment n.o.v. as the trial court.

We believe the trial court here correctly denied Undersheriff Otis' motions. Plaintiff presented evidence at trial upon which a jury could have found Otis liable under § 1983. Burnett testified that Otis assisted with the seizure of plaintiff's truck, and that Burnett, Otis and the Eckhardts, on the morning of the seizure, conducted a warrantless search of the truck. There was also evidence of Otis's involvement in the disposition of the pickup: he allowed the Eckhardts to remove any part of the truck they claimed to be theirs without a prior hearing to determine ownership, and he did not claim that his actions were in

reliance upon prosecutor Moore's legal advice.

We also believe Sheriff Coppock's motion for judgment n.o.v. was properly denied. Sheriff Coppock claims that he relied upon prosecutor Moore's advice and acted under Moore's direction. If the sheriff's duty is unclear, it should be a defense that he relied upon the advice of the prosecuting attorney's office. But the law Sheriff Coppock should have followed is clear here. When allegedly stolen property comes into his custody "he must hold it subject to the order of the magistrate authorized...to direct the disposal thereof." Okla.Stat.Ann. tit.22, § 1321. Further, Coppock has been sheriff for sixteen years, and during that time no doubt had in custody many items of allegedly stolen property that he should have handled under this statute. Under those circumstances we

think the jury could properly find him liable for releasing the allegedly stolen parts of the truck to the Eckhardts without a magistrate's order.

VI

**Prosecutorial Immunity**

We agree with defendant Moore's assertion that he cannot be held liable for the illegal seizure and search of plaintiff's truck. We disagree, however, with his assertion that he is absolutely immune, as a prosecutor, for his actions in allowing the Eckhardts to claim parts from plaintiff's truck without a hearing to determine ownership of those parts.

Moore argues that his actions in disposing of plaintiff's pickup were necessarily a part of his initiation and presentation of the state criminal case against plaintiff, and thus he is absolutely immune from liability for any violation resulting from those actions.

See Imbler v. Pachtman, 424 U.S. 409, 431, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976). But as we said in Coleman v. Turpen, 697 F.2d 1341 (10th Cir. 1982), when the prosecutor managed "the post-trial disposition of seized property not used as evidence that the State did not intend to keep...[he] was acting as an administrator, not as an advocate." Id. at 1346 (footnote omitted). Thus, Moore may not rely on his prosecutorial role to provide absolute immunity for his acts in disposing of the parts of the pickup. Instead, Moore has only a qualified immunity to shield him from liability for his actions. Id. From our examination of the record, applying the Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), qualified immunity standard, we hold that the jury properly could have found that Moore should reasonably have known that

allowing the Eckhardts to remove parts from plaintiff's truck without a hearing violated plaintiff's constitutional rights.

VII

**Punitive Damages**

The trial court granted defendants' motion for judgment n.o.v. on the issue of punitive damages. We recognize that an award of punitive damages involves a "discretionary moral judgment" by the fact finder, see Smith v. Wade, 461 U.S. 30, 52, 103 S.Ct. 1625, 1638, 75 L.Ed.2d 638 (1983), and thus an award, reasonable in amount, made by the jury should not be set aside unless the issue should not have been submitted to the jury in the first place.

The trial court here, in setting aside the jury verdict stated that:

> Upon careful review of all of the evidence it is clear that the plaintiff's proof failed entirely

> to establish such ill will, desire to injure, reckless indifference or malice on the part of any defendant to support the submission of the issue of punitive dmages to the jury. The mistake in judgment in the performance of their respective duties subjected the defendants to actual damages, but such mistakes fell far short of the type of aggravated circumstances required for the award of punitive damages under the applicable authorities.

R. III, 803. The court cited, in support, Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976). In Silver, we affirmed a punitive damage award based on proof that a public official had manifested "reckless indifference to the property rights of others, ill will, a desire to injure or malice." Id. at 163. The Supreme Court recently reaffirmed this standard for punitive damages when it held "that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless

or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. at 56, 103 S.Ct. at 1640. Thus, the trial court used a proper standard in determining the appropriateness of an award of punitive damages.

We have carefully reviewed the record. The trial court correctly states that these defendants made mistakes in judgment sufficient to hold them liable for actual damages. We have affirmed the findings that defendants should have realized they were violating Fourth, Fifth and Fourteenth Amendment rights of plaintiff in the warrantless seizure and search of his truck and in allowing parts to be taken from the truck without providing plaintiff a predeprivation hearing. Nevertheless, we believe the trial court was correct that there was no evidence of malice, wantonness or

oppressiveness to justify punitive damages. Officials cannot be held for punitive damages simply because they did not know the rules of conduct they should follow. Simple ignorance of the applicable legal rules, even arrogant ignorance, does not by itself indicate reckless or callous indifference to federally protected rights.

AFFIRMED.

**APPENDIX B**

MAY TERM - JULY 26, 1985

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, and Honorable John P. Moore, Circuit Judges

| | | |
|---|---|---|
| DAVID LAVICKY, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| Cross-Appellant, | ) | |
| vs. | ) | Nos. 82-1998 |
| | ) | 82-1999 |
| BOB BURNETT, | ) | |
| et al., | ) | |
| | ) | |
| Defendant-Appellants | ) | |
| Cross-Appellees. | ) | |

This matter comes on for consideration of Appellant Ed L. Moore's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard. Judge Seth voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case

was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
Clerk

Supreme Court, U.S.
FILED
NOV 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-715

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EDWARD L. MOORE,

Petitioner,

v.

DAVID LAVICKY,

Respondent.

# APPENDIX C
# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1985

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No. 85-715

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED

July 14, 1982

| | | |
|---|---|---|
| DAVID LAVICKY, Plaintiff, vs. BOB BURNETT, Deputy Sheriff of Garfield Co.; RAY PICKLE, Sheriff of Garfield Co.; SAM OTIS, Deputy Sheriff of Alfalfa Co.; DELMAR COPPOCK, Sheriff of Alfalfa Co.; ED L. MOORE, Assistant District Attorney of Alfalfa Co.; UNITED STATES FIDELITY & GUARANTEE CO., a corporation; WESTERN SURETY CO., a corporation, Defendants. | ) | No. CIV-80-865-T |

AMENDED JUDGMENT

In accordance with the Court's Order of even date, the Judgment entered herein

on March 24, 1982, is hereby amended as follows:

IT IS ORDERED AND ADJUDGED that judgment be entered herein in favor of the defendant, Ray Pickle, and against the plaintiff, David Lavicky, as to all claims.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered herein in favor of the plaintiff, David Lavicky and against the defendants Bob Burnett and United States Fidelity and Guarantee Co., jointly and severally, in the sum of $300.00.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered herein in favor of the plaintiff, David Lavicky, and against the defendants Sam Otis and Western Surety Co., jointly and severally, in the sum of $300.00.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered herein in favor

of the plaintiff, David Lavicky, and against the defendants Delmar Coppock and Western Surety Co., jointly and severally, in the sum of $300.00.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered herein in favor of the plaintiff, David Lavicky, and against the defendant Ed L. Moore, individually, in the sum of $300.00.

DATED this 14th day of July, 1982.

_____
UNITED STATES DISTRICT JUDGE

Entered in judgment docket July 14, 1982.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED

July 14, 1982

| | | |
|---|---|---|
| DAVID LAVICKY, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. CIV-80-865-T |
| | ) | |
| BOB BURNETT, et al., | ) | |
| | ) | |
| Defendants. | ) | |

ORDER

This action is before the Court for consideration of the Motion for Judgment Notwithstanding the Verdict filed jointly herein by defendants Bob Burnett, Sam Otis, Delmar Coppock and Ed L. Moore. Also before this Court is defendant Moore's separate Motion for Judgment Notwithstanding the Verdict and, in the Alternative, for New Trial. Plaintiff has responded to the motions and the parties

have submitted briefs in support of their respective positions.

Punitive damages are not a favorite in law and are to be allowed only within narrow limits. In order to sustain an award of punitive damages in an action brought pursuant to 42 U.S.C. § 1983, the evidence must be sufficient to permit a jury to find that the conduct of the public official complained of is such that it manifests such aggravating circumstances as malice, ill will, reckless indifference to the property rights of others or a desire to injure. Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976); Spence v. Staras, 507 F.2d 554 (7th Cir. 1974); Fisher v. Volz, 496 F.2d 333 (3rd Cir. 1974).

The question at hand is whether the evidence presented by plaintiff was sufficient to support submitting the issue of punitive damages to the jury.

During the course of the trial the Court held that the circumstances of the case clearly required that a search warrant should have been obtained before the search and seizure of plaintiff's vehicle and, as a matter of law, such search and seizure without a warrant was a violation of plaintiff's Fourth Amendment entitlements. The evidence established that the failure to obtain a search warrant prior to the search and seizure was a mistake on the part of the officer involved, for which mistake the jury compensated the plaintiff in the sum of $300.00 actual damages. Likewise, the disposition of plaintiff's property by the other defendants, without proper legal procedures, resulted in the same award of damages against each of them. As to the actual damages sustained, it cannot be held that the evidence does not support the jury's verdicts. However, upon careful review of all of the evidence it is clear that

the plaintiff's proof failed entirely to establish such ill will, desire to injure, reckless indifference or malice on the part of any defendant to support the submission of the issue of punitive damages to the jury. The mistake in judgment in the performance of their respective duties subjected the defendants to actual damages, but such mistakes fell far short of the type of aggravated circumstances required for the award of punitive damages under the applicable authorities. For example, Deputy Burnett had recommended probation for plaintiff in a previous car theft case and on another occasion tried to help him by counseling plaintiff about associating with a more law abiding group of friends. All defendants had good reason to believe that plaintiff had substantially commingled stolen parts with parts on his own vehicle. A controlling motivation in their actions sur-

rounding the holding and disposition of the property was a desire to avoid returning to plaintiff the commingled parts they believed he had stolen from others when returning to him the rest of his own vehicle. Again, while their failure to seize, hold and dispose of the property was not in conformance with required legal procedures, it can hardly be said that their actions were based on any of the several aggravated circumstances required to support punitive damages. Accordingly, the jury's verdict as to punitive damages, is hereby set aside, and the defendants' Motions for Judgment Notwithstanding the Verdict are sustained as to punitive damages. In all other respects, the defendants' motions are hereby denied. The judgment will be amended in conformance with this Order.

IT IS SO ORDERED this 14th day of July, 1982.

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-715

# In the Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD L. MOORE,
*Petitioner,*
v.
DAVID LAVICKY,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November, 1985

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No. 85-715

In the
Supreme Court of the United States
OCTOBER TERM, 1985

EDWARD L. MOORE,
*Petitioner,*
v.
DAVID LAVICKY,
*Respondent.*

**RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**
**(Respondent's Brief in Opposition)**

The Respondent, David A. Lavicky, by and through his counsel of record prays that a Writ of Certiorari not be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter. The Petitioner's Brief has been reviewed, and the grounds why the cause should not be reviewed are, as follows:

## I. FIRST GROUND WHY THIS CAUSE SHOULD NOT BE REVIEWED.

### A. Characterization of "Facts" by Petitioner

Petitioner, Edward L. Moore's, characterization during all appeals of the civil rights trial "findings of fact" by the federal jury. The federal civil rights jury of 1982 did not

find Mr. Lavicky to be the "thief". Mr. Lavicky is today a hardworking citizen of Garfield County, Oklahoma. Mr. Lavicky denied to the federal jury and at all times a stealing of a 1958 pickup out of Alfalfa County despite the 1979 state court conviction of him for that theft. The federal jury was asked by these civil rights Defendants to reweigh Mr. Lavicky's guilt for that theft, and the federal jury did not find him to be a "thief" as Petitioner claims. The federal jury was also not impressed with witnesses the Defense brought into the federal civil rights trial to reiterate what they had said in the state trial to convict Lavicky. These state witnesses were not indicted, although admittedly involved in that 1979 theft. To take what these paraded, "state court witnesses" said as "the statement of facts" of the federal civil rights trial and the federal jury's "findings of fact" is clearly erroneous and misleading.

***Statement of Relevant Evidence***
***Before the Federal Civil Rights Jury***

[Tr. = trial transcript & ROA Vol. XI & XII]

On March 15, 1979, Plaintiff was arrested at his home in Enid, Oklahoma, by Defendant Bob Burnett, Deputy Sheriff of Garfield County, for larceny of a 1958 pickup in Alfalfa County (Tr. 14, l. 22). Plaintiff was working on his 1964 Chevrolet pickup truck which was parked in his private parking place at his home (Tr. 14, l. 7). Defendant Bob Burnett allowed Plaintiff to go inside his trailer alone to get a sheet to cover the motor and close the hood with the valve covers off the engine and lock the pickup (Tr. 15, l. 8-12). Thereafter, said Defendant Bob Burnett took Plaintiff to the County Jail in Enid, Okla-

homa, and booked him into jail (Tr. 15, l. 2-3). Defendant Burnett knew that an arrest warrant had been issued in Alfalfa County for Plaintiff's arrest, but no search and seizure warrants were issued or requested in either county, at that time or subsequently, although the jury heard testimony that stolen automobile parts were suspected to be in the possession of the Plaintiff from information the Garfield County and Alfalfa County Sheriff's offices had obtained through interviews on March 8 and 9, 1979, *eight days earlier* (Tr. 276) (Tr. 262, 263, 264) (Tr. 265, l. 14-20).

The next morning, on March 16, Defendant Burnett took time to come to the Plaintiff in jail and asked him if he would sign a consent form for him, Burnett, to search Plaintiff's home and 1964 Chevrolet pickup parked there. Plaintiff advised Defendant Burnett he had nothing to hide, but he would like to see the consent papers and consult with his lawyer before signing them (Tr. 17, l. 6-12; 18-20) (Tr. 18, l. 12-18).

Instead, Defendant Burnett, about 9:00 a.m. on March 16, 1979, got a wrecker service, Peter Martin. Burnett met the wrecker at the entrance to the trailer park in which Plaintiff lived and guided the wrecker to Plaintiff's home (Tr. 72). There at Plaintiff's home the wrecker hooked up Plaintiff's pickup truck at Defendant Burnett's, and possibly Sam Otis's (Tr. 281), direction and hauled it to Franklin Motors' lot in Enid (Tr. 72, 73) (Tr. 252). Defendant Bob Burnett and Defendant Sam Otis (Tr. 276, 1. 14-21), working closely together on the case (Tr. 288, l. 10), had not obtained a search and seizure warrant or consent to seize or search the Plaintiff's pickup (Tr. 287, 1. 16) (Tr. 255-256) (Tr. 18) (Tr. 269-271) (Tr. 454, l. 11 to Tr. 455,

l. 14). Defendant Burnett testified at trial and Defendant Ray Pickle by deposition at trial that Defendant Burnett only assisted Defendant Otis in the hauling of Plaintiff's pickup from Plaintiff's home to Franklin Motors and later only assisted Defendant Otis in the search of the vehicle (Tr. 279-281) (Tr. 454, 455) (Tr. 281, l. 1-24). Defendant Otis did not testify in order to defend himself before the jury, but his deposition was read to the jury where he said he did not go with Burnett to Plaintiff's home and did not know about the taking of Plaintiff's pickup from Plaintiff's home until after Burnett took it to Franklin Motors (Tr. 444, l. 12 and Tr. 445). Conflicting defense statements, therefore, went to the jury.

Some time around noon or shortly thereafter the same day, March 16, Defendant Sam Otis, Deputy Sheriff of Alfalfa County, came from Alfalfa County to the Garfield County Courthouse, *according to Otis's deposition testimony,* talked to Plaintiff (Tr. 442, l. 5), and thereafter Otis and Burnett and the Eckhardt's father and son who were called (Tr. 443, l. 1) (Tr. 223, l. 1-9) and who had had a 1958 pickup stolen in Alfalfa County, went from the Courthouse to the Franklin Motors' lot (Tr. 442, l. 22) and searched Plaintiff's 1964 Chevrolet Pickup (Tr. 443, l.23; Tr. 444, l. 2; Tr. 253). Neither Defendant Otis nor Defendant Burnett bothered to or even tried to obtain a search warrant for this search before leaving the Garfield County Courthouse to go to the Franklin Motors' lot (Tr. 285, l. 1) (Tr. 441) (Tr. 455, l. 2-4). That same day Plaintiff was transported to the Alfalfa County Jail by Defendant Otis (Tr. 443, l. 14).

Five days later and on March 21, 1979, Defendant Otis came to Enid and met at Franklin Motors Defendant Bob Burnett and one Tom Kent who had brought a wrecker from Helena in Alfalfa County on the instructions of the Alfalfa County Sheriff's office (Tr. 20) (Tr. 78-80) (Plaintiff's Exhibit No. 10A; Plaintiff's Exhibit No. 12, ROA Vol. V; Tr. 287, l. 23). Mr. Kent transported Plaintiff's 1964 Chevrolet pickup from Franklin Motors in Garfield County to Helena, Oklahoma, in Alfalfa County (Tr. 80, l. 25). Defendant Sam Otis and Defendant Delmar Coppack had not bothered to get, or ask about getting, and had no search and seizure warrant to take Plaintiff's vehicle out of Garfield County to Alfalfa County. Defendant Burnett and Defendant Pickle of Garfield County did not question this. They treated the matter as if they were just helping Alfalfa County seize and secure the pickup (Tr. 218) (Tr. 454-456) (Tr. 460-461, l. 10-14) (Tr. 456, l. 16-20) (Tr. 451, l. 8-18). Again, at trial Defendant Otis did not testify. Neither did Defendant Coppack or Defendant Pickle, but depositions were read (ROA Vol. VI-IX). Defendant Burnett's deposition was read to the jury where he stated that District Attorney Ed Moore advised Defendant Sam Otis to go and get the Plaintiff's pickup and bring it to Alfalfa County (Tr. 291, l. 16-22). Defendant Moore said the Eckhardts first asked him about getting the pickup soon after they had looked at it in Garfield County at Franklin Motors on March 16, 1979 (Tr. 353, l. 4).

Plaintiff's 1964 Chevrolet pickup was stored at Tom Kent's Garage in Helena from March 21, 1979, to November 7, 1979, without due care (Tr. 85) (Tr. 452, l. 17-24), and testimony was that a stereo was stolen from it there

(Tr. 82, l. 23). On November 7, 1979, pursuant to instructions from the Alfalfa County Sheriff's office, the pickup was transported to the Courthouse in Cherokee for one day (Tr. 23, l. 2-6) (Tr. 81, l. 2-4). Thereafter, it was returned to Kent's garage in Helena by Tom Kent, making a total of 297 days in storage there with over 225 days outside, unprotected (Tr. 81, l. 23-24).

On November 7, 1979, Plaintiff was convicted of larceny of a certain 1958 pickup, mentioned earlier, in the District Court of Alfalfa County, which vehicle had been owned by the Eckhardts (Tr. 48, l. 14) (Tr. 8) (Tr. 130, l. 11) (Tr. 208, l. 22). He was the only one of four boys [Coleman, Mootz, Joslin, Bodell] implicated who was charged with this crime. The other boys testified against him at the criminal trial as they saw fit and for their own benefit. Coleman changes his story as to what he knows or doesn't know about pickup parts depending on who he is talking to (Tr. 375). *Plaintiff David Lavicky maintains his innocence of the theft of the Eckhardt pickup to this day.* On the advice of his attorney he was not able to testify at the state trial and explain what he explained to this federal jury. This properly went to the jury and was open for their consideration in this civil trial (Tr. 259-260) (Tr. 52-53) (Tr. 400-411). The Eckhardts had, since March 16, 1979, told Defendants Burnett, Otis, Coppack and Moore that they believed parts from their stolen vehicle were on the Lavicky 1964 Chevrolet pickup (Tr. 254, l. 8-10) (Tr. 351-353) (Tr. 446-448) (Tr. 265, l. 14-20). The Plaintiff did testify at trial that around that time he traded for, and later put on his 1964 pickup, some secondhand automotive parts he got from two of the boys, Coleman and Joslin, implicated

but not charged with the theft of the Eckhardt pickup. Some of these traded-for, secondhand parts could have come from the Eckhardt pickup (Tr. 404) (Tr. 400-411).

However, in the criminal proceedings against the Plaintiff, no warrants were ever issued to seize and search Plaintiff's pickup on March 16, 1979, despite the March 8 and 9, 1979 information given to authorities by Coleman, Joslin and Mootz. Plaintiff's pickup was just confiscated, miscared for and eventually cannibalized. No automotive part was removed from Plaintiff's 1964 pickup for the purposes of identification to demonstrate third-party ownership at the criminal trial nor any part introduced into evidence in the criminal trial (Tr. 314-315) (Tr. 21, l. 10-11) (Tr. 49, l. 13-23) (Tr. 15, l. 4-25). Only a tool set, purported to have been inside the Lavicky 1964 Chevrolet pickup, was even offered into evidence, but admission was denied by the state trial judge on a renewed trial motion to suppress any such evidence by reason that it came from the illegal search and seizure of Plaintiff's 1964 pickup in Garfield County by Defendants Burnett and Otis (Tr. 340 and Tr. 349). No other item, part or accessory of Plaintiff's pickup was offered into evidence (Tr. 153).

On December 18, 1979, Plaintiff's motion for a new trial in the criminal case tried on November 7th was overruled (Tr. 131). On that day Plaintiff, through his attorney Peter Keltch, requested Defendant Moore to make arrangements for the return to Plaintiff of his 1964 Chevrolet pickup, which was not used in the criminal trial. Defendant Moore advised Peter Keltch, in the presence of Plaintiff and others, that as soon as the Eckhardts removed the parts from the vehicle which they had told him were theirs,

the Plaintiff could have what was left (Tr. 131-133). Defendant Moore commented to Mr. Keltch that if they didn't like it, they could just sue us — sue us if you want (Tr. 133, l. 1-14).

Thereafter, in December 1979, Defendant Moore, Sheriff Coppack and Deputy Otis, without notice to Plaintiff and without hearing or order of the District Court of Alfalfa County (Tr. 89-97) (Tr. 226-227) (Tr. 133), made private arrangements with a garage in Cherokee, owned by Lewis Lavicky, to which Plaintiff's vehicle could be taken for the Eckhardts to identify for themselves [no authority was present to verify what they did (Tr. 94-95)] and remove parts they thought to be theirs (Tr. 450-451) (Tr. 351-354) (Tr. 89-97) (Tr. 99-101). Mr. Lewis Lavicky said he had not told or thought it necessary to tell his father or his brother, the Plaintiff, what arrangements he had made with Mr. Moore for the Eckhardts to come to his shop (Tr. 100, l. 14). The Plaintiff, David Lavicky, didn't know about it. He was shocked and mad to find his pickup ruined on seeing it in January 1980 in the county barn (Tr. 135). Mr. Keltch had no idea why he wasn't notified about the disposition of Plaintiff's pickup prior to January 22, 1980 (Tr. 13, l. 1) (Tr. 135, l. 5), when it was apparently stripped out by January 2, 1980. Mr. Moore testifies at Tr. 316 that the agreement was made between Mr. Lewis Lavicky and the Eckhardts through his office and the Sheriff's office. He then said yes, after being asked whether he informed Peter Keltch of this agreement (Tr. 316, l. 25). It is doubtful that the jury believed that Plaintiff or his attorney knew about this illegal stripdown of Plaintiff's pickup. On cross-examination Mr. Moore later said he



couldn't remember telling or talking to the Sheriff's office about the agreement to strip the pickup (Tr. 352, l. 12-15).

It was Alfalfa County Sheriff's Department, Defendant Sam Otis or Defendant Delmar Coppack, who called Tom Kent and told him to take Plaintiff's 1964 Chevrolet pickup to the private garage in Cherokee. Defendant Otis met Mr. Kent at the garage when the pickup arrived on January 2, 1980 (Tr. 82) (Tr. 453, l. 4-7). The Eckhardts were notified to go to the garage where they ripped out parts. How many is anybody's guess. *The engine, transmission, wheels, gear-shift, stereo, speakers and other parts* mentioned by the Plaintiff at Tr. 400-411 were gone. The seats were torn. The carpet torn. The paint all corroded (Tr. 25) (Tr. 446, l. 18-25) (Tr. 225-227) (Tr. 354). What was left of the Plaintiff's pickup was hauled to the Alfalfa County barn (Tr. 451) after Lewis Lavicky called Defendant Coppack to have it removed from his garage (Tr. 96-97), and Plaintiff was then officially notified in late January 1980 that he could go there to get the remainder (Tr. 134-136). When the Plaintiff saw the condition of his pickup, he left the remainder in the barn (Tr. 125) and went to see Mr. Keltch. Mr. Keltch called Mr. Moore about the dismantling of Plaintiff's pickup and the taking of parts. Mr. Moore told Mr. Keltch to have Plaintiff "contact his insurance company" (Tr. 136).

**The damage and loss to Mr. Lavicky's 1964 pickup was far more than even the Eckhardts "claimed" was theirs. If Mr. Lavicky came by his pickup through purchase as he testified, the problems involved with buying various items, some of which might have been previously stolen, as testified to by others, does not make it right or rightful for**

**"claimers" to randomly rip things out of the buyer's truck with help from governmental officials who were also "claimers" long-time family friends, such as Mr. Moore.**

In addition to this testimony, the jury heard extraneous testimony from Eckhardt, Coleman and Mootz that was used at Plaintiff's criminal trial to convict him of the theft of the 1958 Eckhardt pickup. These three people testified to knowing little, if anything, about the taking, searching, transporting and lack of care given to Plaintiff's 1964 pickup by Defendant officials (Tr. 221 and Tr. 380). The Plaintiff's attorneys attempted to stop Plaintiff's civil rights trial from deteriorating into a retrial of him for a 1979 theft of a 1958 pickup by way of a Motion in Limine (ROA 522, 608). The Judge overruled the Motion in Limine and in came pages of prejudicial testimony that had no bearing whatsoever on whether Defendants violated Plaintiff's civil rights in their actions. Certainly it cannot be said by these Defendants that any awards against them by the federal jury for actual or punitive damages to deter the type of conduct in this statement of facts was the result or act of passion, partiality or prejudice of the jury in favor of the Plaintiff, David Lavicky, in this case.

## II. SECOND GROUND WHY REVIEW SHOULD NOT BE GRANTED.

### B. Characterization of Controlling Law by Petitioner

On page two, three and four Petitioner, Edward L. Moore, quotes what he calls the "relevant constitutional and statutory provisions." Of this case? Or of his Petition for Certiorari? If he means of this case, he is specifically omitting 42 U.S.C. § 1983, a statutory, federal question provision under which this case was brought in federal district court. Maybe it is omitted because it reads this way:

> "*Every person* [*not just governmental unit*] *who, under color of* any statute, ordinance, regulations, custom or usage of any State or Territory, *subjects or causes to be subjected, any citizen* of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, *shall be liable to the party injured in an action at law,* suit in equity, or other proper proceeding *for redress.*"

As Respondent reads the above, Mr. Edward Moore was a "person acting under color of state law" who subjected and caused to be subjected a citizen, one David Lavicky, to a deprivation of his constitutional rights, and Mr. Lavicky is entitled to redress from the type of "person" named in § 1983, above, who is personally liable for injuring him in this way.

The Petitioner is interpreting recent case law from this Court in such a way as to write the above statute off the books. To help bolster Petitioner's belief in his right to deprive Mr. Lavicky of his constitutional civil rights redress against Edward Moore personally, he further quotes state statutes: the political subdivision state tort claims act

of Oklahoma 51 O.S. Supp. 1978 § 153 and § 162 and 74 O.S. Supp. § 20f.

It is hard to tell whether Petitioner believes the above quoted state statutes gave Mr. Lavicky a cause of action personally against Mr. Moore, the Petitioner, after Mr. Moore's 1979 actions and at the time of Mr. Lavicky's civil rights lawsuit in 1981 under 42 U.S.C. § 1983. However, it can be definitively said that:

(1) Oklahoma Title 51, the Subdivision Political Tort Claims Act did **not** give Mr. Lavicky a cause of action against **Mr. Moore** personally for the constitutional wrongfulness of Mr. Moore's conduct toward Mr. Lavicky, which conduct rendered him personally ("every person") liable to Mr. Lavicky under § 1983. [This state law has been amended to include *personal liability of state officers,* such as Mr. Moore, an acting state district prosecutor at the time of his wrongful conduct. However, the amendment to include wrongful actions of *state* officers did not become effective until *October 1, 1985.*] Nevertheless, it is still to be seriously questioned if the Petitioner means to contend that at any time, or ever, a state tort claims act will or should take the place of federal question statute 42 U.S.C. § 1983 for governmental officials' personal liability violations of the Constitution of the United States. In fact, state tort claims acts always address and recognize the possibility of paying for any personal liability damages that result from employees' violations of civil rights by individual governmental officials committing unconstitutional acts, and Oklahoma is no exception here. There is even mention in Petitioner's brief at page 23, 1. 13, that since the state of Oklahoma has concurrent jurisdiction with the federal district courts to redress violations of constitutional rights, then the federal

district courts can and should abstain from trying federal question cases. It is hard to imagine that other federal jurisdictional bases, such as federal diversity jurisdiction, are somehow more fundamentally and federally important than case jurisdiction for violations of federal rights.

(2) The Petitioner added to his Petition for Certiorari another state statute, 74 O.S. Supp. 1976, § 20f, shown effective in 1976 and before his wrongful conduct toward Mr. Lavicky. Apparently, this statute renders even *state officials* personally liable, just like private citizens, for actions taken *outside the scope of their authority*. This statute was not cited to the Court of Appeals in his Petition for Rehearing. It was added in an all-out effort to get this Court to adopt a novel theory that if the state **had** some avenue, any avenue, of attack for Mr. Lavicky against Mr. Moore personally, then he cannot redress under § 1983 where he asks a federal jury to consider whether his constitutional rights have been violated by a state officer, Mr. Moore.

In the first place, 74 O.S. Supp. § 20f addresses *only those actions* of an individual working for a state taken *outside* the scope of his employment (general authority). The wrongful actions Mr. Moore took toward Mr. Lavicky occurred during the course of his job, in his general capacity as a state official, i.e., administrative duties, as found by the jury. Further, the jury had *explicit instruction* from the Trial Court that if the jury believed that Mr. Moore was acting in his prosecutorial authority only, when the acts occurred, then Mr. Moore could not be found personally liable under § 1983 because he would be absolutely immune from § 1983 liability by law.

In the second place, Petitioner is speaking both ways, isn't he, when he tries so hard to find a state statute where he could have been *personally sued* by Mr. Lavicky in state court and, therefore, state "remedy" is adequate against "him," and then makes the thrust of this Certiorari the proposition that if Mr. Lavicky had any right to *any kind of relief* at all in a state forum, *and* even if he didn't have any redress against Mr. Moore personally in state court at that time, his constitutional rights were not violated by Mr. Moore or any other "person" acting under color of state law because the "state" didn't know or intend to violate his rights.

## III. THIRD GROUND WHY REVIEW SHOULD NOT BE GRANTED.

### C. Improper Interpretation of § 1983 Liability of State Workers

From Petitioner Moore's brief for granting certiorari, pages 18 and 22:

> "However, their conduct (Defendants' individual conduct) was 'random and unauthorized' from the point of view of the State of Oklahoma which has established a statutory procedure for determining ownership of stolen property. 22 O.S. 1981, §§ 1321-1322. Indeed, there is no conceivable way the State of Oklahome could anticipate or forestall the failure of state actors to follow the statutory procedure, whether that failure is negligent or intentional. The State is simply not in a position to provide for pre-deprivation process before its employees disposed of the truck without following the proper statutory procedure. *Parratt* and *Hudson* were intended for just such circumstances as this."

> "The adoption of the wrong theory by the Court of Appeals leaves public officials throughout the Tenth Circuit at jeopardy from unnecessary federal litigation where the states of that circuit provide constitutionally adequate post-deprivation remedies. It literally results in making federal cases of simple matters which, as here, deal only with the ownership and disposition of property."

In response to the above, Respondent Lavicky would like to refer the Court to his response to Appellant Moore's Petition for Rehearing in the Tenth Circuit Court of Appeals filed in June 1985.* The reason is twofold. First, there is insufficient time now to respond fully to the above position of your Petitioner Edward Moore. Second, there is insufficient space here to do justice to the confusion engendered by *Parratt* and *Palmer* which I refer to there as *Parratt-Palmer analysis*. I will excerpt some of it to make this ground for denial of review. In a word, I would refer the Court to *Lugar* v. *Edmondson Oil Co., Inc., et al.*, 457 U.S. 922 (1982), for its analysis of the relationship of the "state action requirement" of the Fourteenth Amendment and the "acting under color of state law" for individual violations under 42 U.S.C. (1983). *Lugar* further reiterates the historic purpose of § 1983 recognized in *Monroe* v. *Pape*, 365 U.S. 167 (1961), which is to prevent individual state officials from using the cloak of their official authority under state law to violate citizens' rights and guarantees. Much of Petitioner's argument was rejected by the majority in *Monroe* v. *Pape* long ago.

Who is the "state," anyway? If the "state" legislates its employees to do right, does that cloak state employees from all personal unconstitutional conduct? Isn't Petitioner

really wanting a state statutory cloak of worker immunity to write § 1983 off the books as far as state employees' personal liability is concerned? And who said this case was a *simple matter* of "ownership and disposition of property?" The same state that vows to protect Mr. Lavicky's fundamental constitutional rights in its state court if the federal court abstains?

This case involved liability for the "wrongful conduct of governmental officials acting under color of state law," not a "determination of ownership and disposition of property." All events arise from a set of circumstances, but the events themselves can give rise to a cause of action in their own right, as here. Cases which address the rightfulness or wrongfulness of the conduct of governmental officials operating in a constitutional framework are not to be taken lightly in any democracy. The fact that this must be written in response to a brief of the Attorney General of a State shows how serious this comment is.

## *EXCERPTS FROM RESPONSE TO PETITIONER MOORE'S PETITION FOR REHEARING IN THE TENTH CIRCUIT

### II. The Procedural Due Process Violations Here Using Parratt-Palmer Analysis

Assuming arguendo, that Mr. Lavicky's constitutional cause of action against Defendant Moore and others is limited to procedural due process violations, **and** that a state remedy **had existed** in Oklahoma assessing Moore's and other officials' conduct, post-deprivation, **and** that the *Monroe* v. *Pape*, 365 U.S. 167 (1961), abuse of power and authority doctrine is no longer applicable to Defendant

state actors violating procedural due process, **and** that **Palmer** reasoning should be retroactively applied to "intentional deprivations of property cases," **then** this Court would have to hinge a procedural due process decision on whether or not the conduct of Defendants Moore, Coppack and Otis in relinquishing Lavicky's pickup to the Eckhardts for demolition was **part of and pursuant to acceptable and established practices in the handling of private property in "state" custody and control in order to be fairly attributable to the "state" under the Fourteenth Amendment limitation of protection against "state action" according to Parratt-Palmer analysis.**

*Plaintiff believes the record shows* [excerpts follow this Part II] *that this conduct was part of and pursuant to accepted and established courses of conduct in the handling of private property in the custody and under the control of named state actor officials.*

The ungarnished fact that Oklahoma had statutory frameworks for handling property in state custody and control, and 22 O.S.A. § 1321 and § 1322 [which] might have been applied here, which book procedures were ignored by Defendant state actors, does not mean they were acting *without all* the authority of state. Exercises of state authority can be found by studying the courses of conduct and the acceptable attitudes of "the right way to do it" of Defendants faced with varying factual situations. The Defendants themselves had a positive attitude that they acted within their authority in the manner they handled the property. They denied legally improper conduct in court. All Defendants here agreed with and accepted Defendant Moore's planned approach and helped create and

carry the plan into effect. The planning and coordination with others made it impossible to act randomly. The argument now is that the conduct was **unauthorized** by written state law and, therefore, no pre-deprivation opportunity to be heard was warranted because the state also had adequate post-deprivation remedy. [*What remedy? is the first question.*] Further, as Justice Logan noted in his ruling, Defendant Moore indicated he believed he had a **duty** to turn over the allegedly stolen parts to the Eckhardts.

And Justice Frankfurter knew in 1940 that:

> "It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text." *Nashville C. & St. L. R. Co.* v. *Browning*, 310 U.S. 362, 369 ( 1940).

As a matter of fact, all the cases cited by this Court for purposes of this response on "established state procedure" in order to attribute the intentional or negligent violating acts of state officials to the "state" and complete the state action requirement for constitutional deprivation **by the state** under the Fourteenth Amendment ("no state shall deprive . . .") analysis according to Parratt-Palmer procedural due process analysis, do **not** limit cognizable § 1983 claims to those **where written** state laws or policies **have not been violated** by state officials, **or** only those cases

where the violation lies in the procedural **structure of the written state law or policy.**

Court scrutiny continues into the way things are *actually or usually done* in similar contexts and the official attitudes about those matters in order to find the real way the state is carrying on its business. And, again, under Parratt-Palmer if the accepted practices are without pre-deprivation opportunities to be heard and an emergency isn't shown, then something the "state" generally does is constitutionally wrong no matter what the [state] books say to do.

In recent cases, such as those mentioned by this Court, "attribution for state action" Parratt-Palmer analysis is *compared to* city officials' actions when deciding whether to hold the city "itself" liable for official constitutional deprivations as an "individual" under § 1983. ("No individual acting under color of state law shall deprive . . .".) Often a Parratt-Palmer analyzed case will make reference to a case deciding municipal (or political subdivision) liability under *Monell* v. *Dept. of Social Services*, 436 U.S. 658 (1978) **standards** for attributing officials' actions *to the city*, because there is no respondeat superior liability or vicarious liability, *only individual* [*actor*] *liability under § 1983*. For example, *Burtneiks* v. *City of New York, et al.*, 716 F.2d 982 (2nd Cir. 1983), a procedural due process case against the city and city officials who failed to follow the municipal code procedures and were sued for intentional demolition of a building without predemolition opportunity to be heard by the owner, relied on *Rookard* v. *Health and Hospitals Corp.*, 710 F.2d 41 (2nd Cir. 1983), a case deciding whether there is a § 1983 cause of action against

a political subdivision. *Burtneiks*, supra, says in order to attribute officials' actions under Parratt-Palmer Fourteenth Amendment state action analysis:

> "In our view, however, decisions made by officials **with final authority over significant matters,** which contravene the requirements of a written municipal code, can constitute **established state procedure.** Cf. Rookard, 710 F.2d at 45.":
>
> and, **Rookard:**
>
> "The difficulty, of course, lies in identifying those officials whose actions, because they may be fairly treated as the municipality's acts, establish policy. **Where an official has final authority over significant matters involving the exercise of discretion, the choices he makes represent governmental policy."**

But one cannot help noticing the *reverse-purpose attribution in* Parratt-Palmer analysis even though municipality liability standards *are used to determine state action*. One attributes acts of city actors to a city to decide if a **city itself,** separate from the governmental actors, should be held amenable to a § 1983 suit. One attributes **acts of state actors** to the state in Parratt-Palmer to decide if the **state actor** should be held amenable to a § 1983 suit. **Usually when acts are attributed, or anything else for that matter, it is to determine the status of the "individual" to whom the acts are attributed.** There is no controversy with looking for "attribution to the state" to fairly decide if the state *itself* [like cities] should be amenable to § 1983 suit, but there is controversy with drawing a *new line* between governmental officials and their governmental employer for Fourteenth Amendment "state action" purposes [to decide

if *state officials* themselves should be amenable to § 1983 suit]. See *Lugar*, Part IV, not in accord.

And if Parratt-Palmer insists in drawing that line, courts generally must acknowledge that "fair attribution" occurs for *Monell* municipality liability purposes in a *broader range of circumstances* than just checking to see if the official followed or did not follow a "book procedure." Even a restrictive reading of *Monell* from the Fifth Circuit in *Bennett* v. *City of Sidewell*, 728 F.2d 762 (5th Cir. 1984), recognizes definitions of attributable city officials' actions to cities (and, by analogy, Parratt-Palmer state action requirement) in **courses of conduct well settled** so as to constitute custom or usage **with the force of law** formally **or informally** adopted, and custom is one form which policy takes and by which it is proven and **patterns of conduct in actual practice** may be called customs. The pattern of conduct and care toward private property in present Defendants' custody and control had the force of law in Alfalfa County, even if not formally "on the books." Present Defendants had final authority over disposal of Lavicky's pickup, and they knew it and chose openly what to do in a planned and publicly known pattern of conduct toward property officially held in that county. All Defendants saw nothing wrong or unusual about their conduct under state law and did it easily after the pickup had been in state custody and control for over nine months. There were nine months to think what to do if any Defendant had doubted his ability to dispose of the pickup lawfully and with state authority.

Should we look at dead letter statutory law in that county and hold the Defendants were acting without all official authority or look to the higher calling to duty **clearly claimed** by Defendant Moore and accepted by all who felt it in their legal discretion and obligation as state actors to dispose of the pickup to the Eckhardts, dispensing with mere book procedures?

Before turning to the record this Court also drew attention to *McKee* v. *Heggy*, 703 F.2d 482 (10th Cir. 1983). Here the Court sought out **customary procedures** of the Oklahoma City Police Department to see if the acts of officials who wrongfully disposed of an impounded auto could be attributed *to* Oklahoma City to determine *the city's* amenability to § 1983 suit. It noted the evidence of record and implied in footnotes that *these same considerations* would be considered in Parratt-Palmer analysis to see if *city officials* were also amenable to § 1983 suit. Therefore, the idea of "state action reverse-purpose attribution" has come to the Tenth Circuit. However, it was also noted in *McKee* . . . that the **feasibility** of providing *pre-deprivation* opportunity to be heard shall be *carefully* studied in the Tenth Circuit before it is decided that the *post-deprivation* state remedy, if existing, is **adequate** for procedural due process purposes. The Tenth Circuit views feasibility inquiry as more than the obvious impracticability of the governmental body preventing an individual official's deprivational act and makes it include the Supreme Court inquiry into the *urgency for immediate deprivation for the public good* as opposed to consideration for the rights of the citizen being deprived. (Appellee Brief, pages 9-15)

### III. A Closer Look at Parratt-Palmer Analysis and § 1983

Just as this case, on its facts, is not an "all fours case for nonliability" for any Defendant herein, including Defendant Moore, seeking to use recent Supreme Court pronouncements of the requirements for cognizable violations of **procedural due process** to eliminate his liability, so must recent Supreme Court pronouncements of requirements for cognizable **procedural due process** causes of action be read against the historical facts, purpose and precedent of American civil rights law. I sincerely believe when this process is undertaken by the Supreme Court, and it most assuredly has not yet been undertaken so as to provide any consistency to interpretation and comparison of all civil rights issues, much of the controversial aspects of the "new state action" teaching will be modified. Otherwise, blaring inconsistencies will continue to arise. The process has already begun. This part of the brief will focus on examples of established precedent, still used by the Supreme Court in other civil rights issues, except procedural due process analysis, and examples of arising inconsistencies on all civil rights issues if Parratt-Palmer inquiries are not carefully read and interpreted along with the realistic "teachings" of established civil rights precedent.

For example:

(1) Parratt-Palmer analysis is causing some courts to exclaim that "a finding that **state action** violated an independent substantive right secured by the Constitution is 'qualitatively' different from a finding that such state action **simply** deprived a citizen of his right to procedural

due process" *Owen* v. *Lash*, 682 F.2d 648, 651 (7th Cir. 1982), quoted in *Spell* v. *McDaniel*, supra.

But the Supreme Court in *Palmer and Parratt* rested their decisions on the basis that no, **absolutely no**, constitutional violations had ever occurred, including procedural due process violations. Yet there is justified confusion above about these holdings because of the uncertainty of knowing when and how much state actor activity to attribute to a state *even to hold the state actor liable for his own actions and even if* his acts are attributed to the state, maybe the state can "fix everything" by providing some kind of post-deprivation relief. Yet the importance of procedural due process properly applied is still with us:

> "Procedural due process rules are meant to protect persons **not** from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property." "The right to procedural due process is absolute in the sense that it does not depend on the merits of a claimant's substantive assertions." "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, **whatever** the ultimate outcome of the hearing." *Carey* v. *Piphus*, 435 U.S. 247 (1978).
>
> "There is no warrant for any separation of constitutional rights into redressable rights and nonredressable rights, of major and minor unconstitutional deprivations, and § 1983 makes no such distinction and authorizes no separation." *Pritchard* v. *Perry*, 508 F.2d 423 (4th Cir. 1975).

(2) The dissent in *Bennett* v. *Sidewell*, supra, at 771, pointed out that the majority's holding *restricting the acts of city officials fairly attributable to the city* to the acts

of high officials in policymaking positions only, and not to those officials given discretion by the city to alter or set their own policies and customary procedures, will effectively allow cities to **immunize** themselves from § 1983 liability for the unconstitutional actions of their appointed officials merely by articulating "facially constitutional" policies in the substantive areas in which officials perform their delegated duties.

Since Parratt-Palmer places so much emphasis on the separateness of the "state" from its "state actors," the above danger can be expressed in this context, also. For instance, Defendant Moore argues that the state statutes for handling exhibits or allegedly stolen goods in Oklahoma are "facially constitutional and on the books" and **immunize him** from suit because any intentional acts of deprivation of Lavicky's property were unjustified solely because he failed to follow these facially adequate book procedures and, therefore, nothing he did was authorized [by the state legislature] and cannot be attributed *to the state* which immunized him by setting up these "facially constitutional procedures" for state actors to follow — so, since there must be a wrongful action by the **state** under the Fourteenth **before he** can be found liable as an individual acting under color of state law under § 1983, he is not liable This overwrites **Parratt-Palmer** analysis to a complete overruling of *Monroe* v. *Pape*, 365 U.S. 167 (1961), which these two cases do **not** purport to do. See *Lugar*, and dissent, infra. (Appellee Brief, pages 32-34)

* * *

These questions are issues in store for courts that follow Parratt-Palmer type thinking without caution, but also questions for **another case where** attributable courses of conduct **do not exist, and** one in a purely procedural due process setting, **and** where a meaningful, available state tort remedy exists to help redress takings to prevent process injustice. And further, Defendant Moore applies far too strict a reading to "acts deemed attributed and, therefore, authorized" by the state under Parratt-Palmer-Logan analysis, as pointed out in Part II. The legislative or other written word on a substantive area of law or policy *is not always the last word attributable to the state* on the subject, and if the last attributed word on the subject is state actor, constitutionally deficient, *policy, custom and usage* (routinely accepted courses of conduct), *then that, too, attributes to the state,* authorizing the conduct, and the Parratt-Palmer state action requirement for a procedural due process violation is met in that way.

For it cannot be denied [at the very least] that an opportunity to be heard prior to final deprivation of his pickup was deliberately denied Mr. Lavicky in this case by these Defendant state actors. A procedural due process violation occurs by Defendant state actors, even under Parratt-Palmer, rendering a post facto state remedy *if any,* **inadequate** as due process . . . when a pre-deprivation of property opportunity to be heard is **not** given *by* operation of a commonly accepted routine, **on the books or not, and** fairly attributable to the state by existence of the applied practice itself; and where it would have been feasible (or enough time available without undue systemic strain) to provide the citizen due process before final deprivation of

his property. There was no stated or recognized need in evidence shown to rush final disposal of Mr. Lavicky's pickup by these Defendants. (Appellee Brief, pages 38-39)

* * *

## CONCLUSION

In Conclusion, persons working for state government, like Mr. Moore, seek a special immunity or cloak from § 1983 liability by claiming that state employee liability should be determined by the same type of criteria and attribution needed to find municipalities (or other political bodies) "personally" liable under § 1983. Since state government cannot be sued directly under § 1983, those working under color of state law *as state employees* are studying ways through confusion, such as "is their unconstitutional conduct attributable "personally" to the state body?" in order to make determinations of their personal liability *hinge on and mean* the type of § 1983 liability attributional findings that would be needed to determine the liability, if allowed, of the state for which they work. Such reasoning misses the wording and intent of § 1983 personal liability to curb abusive use of state power and would create different liability standards between state employees and others operating under color of state law. However, this case was decided correctly under all precedent, even under Parratt-Palmer type analyses, because Mr. Moore's conduct exclaimed an unconstitutional attitude and followed an organ-

ized, unconstitutional, but routine, practice for the state of Oklahoma in those counties. Therefore, review here is inappropriate under all precedent.

Respectfully submitted,

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November, 1985

## CERTIFICATE OF SERVICE

I hereby certify that on the ..... day of November, 1985, service of this Brief in Opposition was made by placing three (3) copies of same in the United States Mail, postage fully prepaid, to Robert A. Nance, Asst. Attorney General, Deputy Chief, Federal Divisions, 112 State Captol Building, Oklahoma City, Oklahoma 73105.

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